IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PLUME DESIGN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N22C-10-181-SKR CCLD
	)	
DZS, Inc.,	)	
	)	
Defendant.	)	

Submitted: July 14, 2023
Decided: August 10, 2023

Upon Consideration of Plaintiff's Motion for Partial Judgment on the Pleadings: **DENIED.**

Upon Consideration of Defendant's Motion for Partial Judgment on the Pleadings: **DENIED.**

J. Peter Shindel, Jr., Esquire, Matthew L. Miller, Esquire, ABRAMS & BAYLISS LLP, Wilmington, Delaware, Harry A. Olivar, Jr., Esquire, B. Dylan Proctor, Esquire, Danielle Shrader-Frechette, Esquire, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, California, *Attorneys for Plaintiff Plume Design, Inc.*

Peter J. Walsh Jr., Esquire, Jesse L. Noa, Esquire, P. Andrew Smith, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Susan Kennedy, Esquire, Kurt Pankratz, Esquire, BAKER BOTTS L.L.P, Dallas, Texas, *Attorneys for Defendant DZS Inc.*

Rennie, J.

I. INTRODUCTION

Delaware law limits a party's ability to assert claims or defenses based on extra-contractual representations. Here, Plaintiff licensed certain services to Defendant. After issues arose related to the purported incompatibility of the software, Defendant refused to pay Plaintiff for the services. Plaintiff asserted breach of contract claims, and Defendant in response asserted defenses based largely on representations made outside the contract. Plaintiff now moves for partial judgment on the pleadings that Defendant is barred from asserting defenses based on those representations. Defendant opposes the motion and also cross-moves that a contractual limitation of liability applies.

Because Defendant did not clearly disclaim reliance on representations as to the software at issue, Plaintiff's Motion for Partial Judgment on the Pleadings is **DENIED**. In addition, because the Court would benefit from a more-developed factual record as to potential damages, Defendant's Motion for Partial Judgment on the Pleadings is **DENIED**.

II. BACKGROUND[1]

A. The Parties and the Agreement

Plaintiff Plume Design, Inc. ("Plume") is a Delaware corporation, headquartered in Palo Alto, California.[2] Plume provides WiFi services, along with network controls for communications service providers ("CSPs") and their subscribers, including personal households and small businesses.[3] Defendant DZS, Inc. ("DZS" or "Reseller," and together with Plume, the "Parties") is a Delaware corporation, headquartered in Plano, Texas.[4] It is a CSP that provides telecommunications networking equipment to customers.[5]

On September 29, 2021, Plume and DZS entered into a Services and Distribution Agreement (the "Agreement") whereby Plume granted DZS a non-exclusive right to market and resell "Plume Services."[6] "Plume Services" are

---

[1] The facts are drawn from the well-pled allegations in the Complaint and documents incorporated by reference, including the Services and Distribution Agreement between Plaintiff and Defendant. Additional facts are drawn from the pleadings as admitted and denied in Defendant's Answer to the Complaint, as well as documents incorporated by reference. *See* D.I. No. 1 ("Compl."); D.I. No. 23 ("Ans.").

[2] Compl. ¶ 7.

[3] *Id*. ¶ 2.

[4] *Id*. ¶ 8.

[5] *Id*. ¶ 3.

[6] Plume's Opening Brief in Support of its Motion for Partial Judgment on the Pleadings ("Pl.'s Motion") Exhibit 1 ("Agreement") §1(a) (D.I. No. 32).

"business administrator/customer-facing" items that include Plume HomePass and Plume WorkPass.[7]

B. OpenSync

To use Plume Services, customers must have "Plume-certified, OpenSync-enabled hardware."[8] OpenSync is a software platform, whose use "is subject to the open source license set forth at <opensync.io> (the 'OpenSync License')."[9] And, collectively with other "Third Party Software," OpenSync is defined as the "Plume Products."[10]

C. Integration Process and Subscriptions Fees

Following September 29, 2021 (the "Effective Date"), DZS was required to physically integrate OpenSync and other Third-Party Software into DZS-approved products.[11] DZS would "integrate OpenSync and the Third-Party Software" into the devices that DZS identified and Plume approved as "commercially viable."[12] Plume could not unreasonably withhold its approval of the devices identified by DZS.[13]

---

[7] *See id.*; Exhibit A to Agreement (Product Suite).

[8] Agreement § 1(c).

[9] *Id.*; Compl. ¶ 2.

[10] Ex. B to Agreement; "Third-Party Software" is identified in Exhibit B to Agreement.

[11] *Id.*

[12] Agreement § 1(c); Ex. B to Agreement.

[13] Agreement § 1(c).

Integration efforts were to be a "collaborative" process between DZS and Plume, and "a high priority," which would "commence as promptly as possible following the Effective Date."[14]

In conjunction with the DZS devices becoming integrated (and OpenSync-enabled), Plume would make subscriptions to Plume Services available to DZS, in exchange for payment of monthly subscription fees.[15] "[DZS] will pay Plume the monthly subscription fee ('the Monthly Subscription Fee') for the Plume Services," and "make its first payment for the Monthly Subscription Fee on the earlier of March 1, 2022, or the completed and Plume approved integration of OpenSync in at least (1) DZS device that meets the specifications required to allow for deployment of the Plume Services."[16] Exhibit D to the Agreement provides a chart for one of the Plume Services, the Home Pass, in which in the first six months, Plume would make 150,000 subscriptions available in exchange for a $75,000 monthly fee.[17] Every six months afterwards the committed monthly fee would increase and so would the number of subscriptions made available to DZS.[18] "In the event that the Agreement

[14] Ex. B to Agreement.

[15] *See* Agreement § 2(a), Ex. D to Agreement; Defendant DZS Inc.'s Answering Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment on the Pleadings (As to Liability) and in Support of Defendant's Motion for Partial Judgment on the Pleadings (As to the Limitation of Liability)" ("Def.'s Opp'n") at 3 (D.I. No. 38).

[16] Ex. D. to Agreement.

[17] *See id.*; Def.'s Opp'n at 3.

[18] *Id.*; Ex. D. to Agreement.

is terminated or not renewed in accordance with Section 7 of the Agreement…the monthly fees owed by [DZS] to Plume will be based on the actual number of subscriptions multiplied by the per subscription monthly fee."[19]

Upon completion of a Plume training program, DZS would take "reasonable efforts" to sell subscriptions to its customer base.[20] It could resell subscriptions to other CSPs,[21] and any "Plume employee sales representatives collaborating with [DZS] in connection with [the] Agreement" was to be "compensated in a channel neutral manner."[22]

D. Purported Anti-Reliance Language and Limitation of Liability

Under the Agreement, the Parties made a series of representations and warranties concerning the Plume Services and Plume Products, which Plume contends contain clear anti-reliance language. Section 3(d) of the Agreement states in relevant part that:

> Disclaimer. [DZS] ACKNOWLEDGES THAT, EXCEPT AS SET FORTH IN SECTIONS 3(a) AND 3(b), PLUME MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER REGARDING THE PLUME SERVICES, OR ANY OTHER SERVICES, SOFTWARE, MATERIALS, OR OTHER ITEMS PROVIDED UNDER THIS AGREEMENT AND SPECIFICALLY DISCLAIMS ON BEHALF OF ITSELF AND ITS SUPPLIERS

[19] *Id*.

[20] Agreement § 1(d)(i).

[21] *Id*. § 1(a).

[22] *Id*. § 1(d)(i).

> VENDORS, AND LICENSORS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE, REGARDLESS OF ANY KNOWLEDGE OF RESELLER'S OR A PROVIDER'S PARTICULAR NEEDS…."[23]

In addition, the Agreement contains an integration clause, stating the following:

> This Agreement supersedes all prior agreements, proposals, oral or written, negotiations, conversations, and discussions between the Parties relating to the subject matter of this Agreement and all past dealing and industry custom.[24]

The Agreement contains a "Limitation of Liability" Section, stating that:

> …TO THE FULLEST EXTENT PERMITTED BY LAW, EXCEPT FOR A PARTY'S OBLIGATIONS UNDER SECTION 4 OR A PARTY'S BREACH OF SECTION 6, NEITHER PARTY SHALL BE LIABLE FOR (A) ANY INDIRECT, PUNITIVE, INCIDENTIAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THIS AGREEMENT (INCLUDING LOST PROFITS AND LOST REVENUE) OR (B) ANY DAMAGES IN EXCESS OF THE AMOUNT PAID OR PAYABLE BY RESELLER TO PLUME IN THE 18 MONTHS IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE CLAIM (THE "LIABILITY CAP"), IN EACH CASE WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, AND EVEN IF EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGES. TO THE FULLEST EXTENT PERMITTED BY LAW, NEITHER PARTY'S AGGREGATE LIABILITY UNDER THIS AGREEMENT WILL

[23] *Id*. § 3(d).

[24] *Id*. § 8.

> EXCEED THE GREATER OF TWO (2) TIMES THE LIABILITY CAP OR $6,000,000.[25]

The Agreement would "continue in effect for five (5) years … (the 'Initial Term')," but could be "terminated earlier by one of the Parties in accordance with the terms of the Agreement."[26] A party had the right to "terminate th[e] Agreement at any time by providing notice of termination to the other Party if the other Party commits a material breach of this Agreement and the breach continued unremedied for a period of 30 days after the non-breaching Party provides notice of the breach to the breach Party."[27]

E. Integration Process Fails

The Parties executed the Agreement on September 29, 2021, and completed the integration process for at least two DZS devices.[28] The process, however, eventually broke down. On June 20, 2022, DZS sent a letter to Plume, informing it that Plume's services were "not compatible" with DZS' devices because "the memory required to run the Plume software far exceeds the available memory in DZS' devices currently in-place at customers' homes and work-places."[29] This issue

[25] *Id*. § 5.

[26] *Id*. § 7(a).

[27] *Id*. § 7(b).

[28] Compl. ¶ 3; Ans. ¶ 24.

[29] Ex. A to Ans.

contradicted representations Plume representatives allegedly made prior to the execution of the Agreement, in August 2021, that Plume's "software 'can go on any device,'" and that "OpenSync could operate on any device."[30] DZS also expressed concerns that Plume had an exclusive reseller agreement with Bell Canada that it did not disclose, and that it failed to compensate its employees in a "channel neutral manner."[31]

F. Procedural History

On October 10, 2022, Plume initiated this action by filing the Complaint for Declaratory Relief and Breach of Contract. On January 9, 2023, DZS filed its Answer, raising a grab bag of affirmative defenses that included (1) failure to state a cause of action for which relief can be granted, (2) unilateral or mutual mistake, (3) impossibility, impracticability and frustration of purpose, (4) fraud, (5) breach of contract, (6) assertion of a contractual limitation of liability defense, (7) failure to mitigate and (8) failure to perform all conditions precedent. On March 20, 2023, Plume filed its Motion for Partial Judgment on the Pleadings, seeking judgment in its favor on the declaratory relief and breach of contract claim, dismissal of DZS's liability defenses, and at least $24,750,000 in damages. On May 8, 2023, DZS filed its Answering Brief In Opposition to Plaintiff's Motion for Partial Judgment on the

[30] *Id.*; Compl. ¶¶ 26-27.

[31] *Id.*; Def.'s Opp'n at 6.

Pleadings (As to Liability), and In Support of Defendant's Motion for Partial Judgment on the Pleadings (As to the Limitation of Liability). On June 15, 2023, Plume filed its Reply In Further Support of Its Motion for Partial Judgment on the Pleadings And Answering Brief in Opposition to DZS's Cross-Motion for Partial Judgment on the Pleadings.[32] On July 7, 2023, DZS submitted its Reply in Support of its Motion for Partial Judgment on the Pleadings (As to the Limitation of Liability).[33] Oral Argument was heard on July 14, 2023.

III. STANDARD OF REVIEW

A party may move for judgment on the pleadings pursuant to Civil Rule 12(c).[34] A court may grant a motion for judgment on the pleadings "where there is no material fact in dispute and the movant is entitled to judgment as a matter of law."[35] The Court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party.[36] The Court must take the well-pleaded facts alleged in the complaint as admitted.[37] A Rule 12(c) motion is "a proper framework for enforcing unambiguous contracts,"

[32] D.I. No. 48.

[33] D.I. No. 52.

[34] Super. Ct. Civ. R. 12(c).

[35] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.,* 1992 WL 181718, at *1 (Del. Ch. July 28, 1992), *rev'd*, 624 A.2d 1199 (Del. 1993).

[36] *Warner Communications, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989).

[37] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).

which have only one reasonable meaning and therefore do not create material disputes of fact.[38]

IV. ANALYSIS

A. The Agreement Does Not Bar DZS's Defenses Based on Extra-Contractual Statements Regarding OpenSync

Plaintiff's Motion hinges on whether DZS explicitly disclaimed reliance on extra-contractual representations relating to OpenSync. Here, DZS did not, and therefore is not barred from maintaining its defenses that are based on alleged extra-contractual representations relating to OpenSync.

Delaware law governs the Agreement.[39] Delaware law enforces clauses that identify the specific information on which a party has relied and which foreclose reliance on other information.[40] Murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its

[38] *Bay Point Cap. Partners L.P. v. Fitness Recovery Holdings, LLC*, 2021 WL 5578705, at *4 (Del. Super. Ct. Nov. 30, 2021) (citations omitted).

[39] Agreement § 8 ("The validity, interpretation, construction and performance of this Agreement, and any dispute that directly or indirectly arises from or relates to this Agreement, is governed by, construed and interpreted in accordance with the laws of the State of Delaware, without regard to its conflicts of laws principles or United Nations Convention on Contracts for the International Sale of Goods.").

[40] *See Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 51 (Del. Ch. 2015); *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004) ("To be effective, a contract 'must contain language that when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.").

oral and extra-contractual fraudulent representations."[41] In order to bar fraud claims, the disclaimer of reliance must come from the aggrieved party.[42] A clear anti-reliance clause may also be effective against other defenses based on extra-contractual representations such as mistake.[43]

Under Section 3(d) of the Agreement, DZS "acknowledges that…Plume has made no representations whatsoever regarding the Plume Services, or any other services software, materials or other items provided under this Agreement."[44] DZS is the party aggrieved who is making this acknowledgment, and the language tracks language in cases Delaware Courts have found containing sufficient anti-reliance language.[45] Accordingly, in conjunction with the Agreement's integration clause,

---

[41] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1056 (Del. Ch. 2006).

[42] *IAC Search, LLC v. Conversant LLC*, 2016 WL 6995363, at *6 (Del. Ch. Nov. 30, 2016); *cf.*, *Anvil Holding Corp. v. Iron Acquisition Co., Inc.*, 2013 WL 2249655, at *8 (Del. Ch. May 17, 2013) (finding that a standard integration clause and a disclaimer from the *seller* did not "reflect a clear promise by the Buyer that it was not relying on statements made to it outside of the Agreement to make its decision to enter into the Agreement").

[43] *See Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002) (stating that "sophisticated parties may not reasonably rely upon representations that are inconsistent with a negotiated contract, when that contract contains a provision explicitly disclaiming reliance upon such outside representations" and dismissing mistake and fraud claims given anti-reliance integration clause in the written contract); *Liberto v. Bensinger*, 1999 WL 1313662, at *14 (Del. Ch. Dec. 8, 1999); *Sanyo Elec. Co. v. Intel Corp.*, 2021 WL 747719, at *12 (Del. Ch. Feb. 26, 2021) (citations omitted) ("[F]ailure of justifiable reliance is fatal to a claim for mutual mistake that supports reformation. This Court has determined that a plaintiff's reliance is unreasonable where the parties have agreed to explicit anti-reliance language in the terms of the governing agreement.").

[44] Agreement § 3(d).

[45] *See e.g.*, *IAC Search, LLC*, 2016 WL 6995363, at *5 (finding along with a standard integration clause, that the following acknowledgement clause by the Buyer barred any fraud claims: "…The Buyer acknowledges that neither the Seller nor any of its Affiliates or Representatives is making,

Section 3(d) operates as an anti-reliance clause. The issue is whether representations as to *OpenSync* fall under the category of (1) Plume Services, or (2) any other services, software, materials or other items provided under this Agreement.

DZS did not disclaim reliance on representations as to OpenSync as a Plume Service. With respect to the first category, Plume argues that OpenSync is encompassed as a Plume Service, because it "is the infrastructure for the Plume Services" and "the software that enables the Plume Services to work."[46] According to Plume, by disclaiming reliance on representations as to Plume Services, it is disclaiming reliance as to OpenSync. Plume's argument, however, fails, because "Plume Service" is a defined term and does not include OpenSync.[47] Indeed, OpenSync is defined as "Plume Products," together with other Third-Party Software.[48]

Under the second category, it is not clear whether OpenSync is "provided under the Agreement." It is true that, under the Agreement, Plume is licensing the Plume Services, and OpenSync is a software that is required to integrate those

---

directly or indirectly, any representation or warranty [concerning information provided during due diligence]…unless any such information is expressly included in a representation or warranty contained in [the Agreement]."); *Abry Partners V, L.P.*, 891 A.2d at 1041.

[46] Plume's Reply Brief in Further Support of Its Motion for Partial Judgment on the Pleadings and Answering Brief in Opposition to DZS' Cross-Motion for Partial Judgment on the Pleadings ("Pl.'s Reply") at 3, 13.

[47] Agreement § 1(a); Ex. A to Agreement.

[48] Ex. B to Agreement.

services.[49] But that does not mean it is "provided" under the Agreement. Other provisions in the Agreement suggest the opposite. For example, the Agreement states that "OpenSync is subject to the open source license set forth at <opensync.io> (the "OpenSync License")."[50] It also separately defines OpenSync, along with other Third-Party Software as "Plume Products," which is distinct from "Plume Services."[51] In short, DZS did not explicitly disclaim reliance on extra-contractual representations as to OpenSync.

Plume offers two arguments to the contrary. First, Plume says in a footnote that because the Agreement provides the link at <opensync.io> in order to access the software, it is "provided" under the Agreement.[52] But the mere copying and pasting of a website link to a document does not mean it is "provided" under the document.

Second, Plume says the Agreement provided DZS "a license to 'embed or integrate ***the Plume Products*** in the Reseller Products for sale solely to Providers solely for use as Enabled Hardware in connection with the Plume Services.'"[53] But this argument does not fully capture the language of the relevant provision. The

[49] *See* Agreement §§ 1(a), (c).

[50] *Id.* § 1(c).

[51] Ex. B to Agreement; Agreement §1(a).

[52] Pl.'s Reply at 15 n.5.

[53] *Id*. at 15 (bold and italics in original).

specific language that Plume cites is from Section 1(a)(ii), which, states in full that Plume grants DZS:

> "a non-exclusive, transferable (except as set forth in Section 8) non-sublicensable, fully paid-up right to use the Plume SuperPod design solely to manufacture, in accordance with the Plume specifications for such design, and embed or integrate the Plume Products in the Reseller Products for sale solely to Providers solely for use as Enabled Hardware in connection with the Plume Services."[54]

The first sentence of Section 1(a)(ii) can be reasonably interpreted to mean that Plume is granting DZS a right to use the "Plume SuperPod" for the sole purposes of manufacturing, embedding and integrating the Plume Products to DZS' devices. Section 1(a)(ii) is not granting DZS a right to use OpenSync; instead, it is granting a right to use Plume Superpod for various limited purposes including "embedding and integrating" OpenSync to DZS' devices. Section 1(a)(ii) does not unambiguously show that the license to use OpenSync was "provided" under the Agreement.

As a separate ground for dismissal, Plume argues that reliance on any extra-contractual representations as to OpenSync is unreliable based on the structure of the integration process.[55] According to Plume, because the Agreement states that "[DZS] must integrate OpenSync and certain third-party software," it was

[54] Agreement § 1(a)(ii).

[55] Pl.'s Motion at 3-4.

unreasonable for DZS to rely on assurances outside the Agreement regarding OpenSync's compatibility with DZS' products.[56]

Plume's argument fails because it ignores that the Agreement states that the integration process was intended to be a collaborative effort.[57] Moreover, whether or not DZS was ultimately responsible for integrating OpenSync does not mean that it was disclaiming reliance on any extra-contractual statements made by Plume regarding the software. Nor does the contingent approval process as to the commercial viability of a product change the result.[58] Whether or not it was reasonable for DZS to expect that OpenSync would be compatible on DZS devices is disputed and not clear from the Agreement.

B. Limitation of Liability Does Not Apply

DZS in its cross motion for judgment on the pleadings seeks a judgment "that Plume's damages cannot exceed the contractual limitations of liability."[59] But DZS is vague on what those specific monetary limits would be. Moreover, moving for judgment on the pleadings is premature in light of the under-developed record in this case.

---

[56] *Id*. at 3.

[57] Ex. B to Agreement.

[58] *See* Pl.'s Motion at 4.

[59] Def.'s Opp'n at 20.

DZS seeks a judgment that it "cannot be held liable for 'any damages in excess of the amount paid or payable by Reseller to Plume in the 18 months immediately preceding the event giving rise to the claim."[60] DZS contends that the letter sent on June 20, 2022 marked the event giving rise to the claim, and that the "amount paid or payable" is the amount of monthly payments owed to Plume" before that day.[61] Plume, on the other hand, contends that it was owed a minimum of $24.75 million in payments, which were to commence upon the integration and approval of one DZS device.[62] Plume says that these payments were guaranteed, but only generally cites to the Agreement and its exhibits.[63] According to Plume enforcing the Limitation of Liability would frustrate the promise by DZS to make the bargained-for future payments.[64]

Although it is not clear why these payments are "guaranteed,"[65] DZS has not demonstrated the amount that is paid or payable in the 18 months preceding DZS'

[60] *Id.*; Defendant DZS's Reply In Support of Its Motion for Judgement on the Pleadings (As to the Limitation of Liability) ("Def.'s Reply") at 6.

[61] Def.'s Opp'n at 22.

[62] Pl.'s Reply at 27.

[63] *See id.* ("As part of the Agreement, DZS agreed to pay a minimum $24.75 million for access to the Plume Services. *See* Agreement § 1(a), Ex. D. Plume had a potential right to receive additional revenues under the Agreement as well; the $24.75 million amount is the minimum guarantee to which Plume is entitled. *See id*. The required payments to Plume were to commence no later than 'the complet[ion] and Plume approved integration of OpenSync in at least one (1) DZS device[.]' Agreement Ex. D.").

[64] *See* Pl.'s Reply at 28.

[65] *Id*. at 5.

letter on June 20, 2022. Because there is a benefit to a further development of the facts and potentially more focused briefing on the language of the Agreement as it relates to damages, DZS' cross motion for partial judgment on the pleadings is denied.[66]

V. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Partial Judgment on the Pleadings is **DENIED**, and Defendant's Motion for Partial Judgment on the Pleadings is **DENIED**.

IT IS SO ORDERED.

Sheldon K. Rennie, Judge

[66] *See Kainos Evolve, Inc. v. InTouch Techs., Inc.*, No. 2019 WL 7373796, at *2 (Del. Ch. Dec. 31, 2019) ("[I]n recognition of the fact that it is preferable for the court to have a factual record before ruling out available remedies, particularly when issues of public policy may be implicated, Delaware courts have held that 'the enforceability of liability limitations should not be decided on the pleadings or on summary judgment'"); *see also eCommerce Indus., Inc. v. MWA Intel., Inc.*, 2013 WL 5621678, at *1 (Del. Ch. Sept. 30, 2013) (enforcing limitation on liability provision) (post-trial opinion).